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# In the Supreme Court of the United States

APRIL DEBOER, *et al.*,
*Petitioners*,

v.

RICK SNYDER, GOVERNOR OF MICHIGAN, *et al.*,
*Respondents*.

*On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*

## BRIEF OF THE AMERICAN FREEDOM LAW CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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## QUESTION PRESENTED

Does the Fourteenth Amendment require a state to license a marriage between two people of the same sex?

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## STATEMENT OF IDENTITY AND INTERESTS OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, *Amicus Curiae* American Freedom Law Center (hereinafter referred to as "AFLC") respectfully submits this brief in support of the respondents, urging the Court to protect and affirm the fundamental right of the people of Michigan to establish their own public policy with regard to the meaning and purpose of marriage.[1]

Defining marriage as a matter of law is the prerogative of the states and not the federal government, including the federal courts. Most important, restricting marriage to one man and one woman promotes legitimate state (and societal) interests. Therefore, this Court should affirm the decision of the U.S. Court of Appeals for the Sixth Circuit, which upheld the right of the people to define marriage for purposes of state law.

AFLC is a national, public interest law firm that advances and defends America's Judeo-Christian heritage and moral values, including the defense of traditional marriage, which is necessary to promote the common good. AFLC accomplishes its mission through

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[1] All parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

*Amicus* AFLC further states that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus* AFLC, its supporters, or its counsel made a monetary contribution to the preparation or submission of this brief.

litigation, education, and public policy initiatives. It has offices in Arizona, California, Michigan, New York, and Washington, D.C.

## INTRODUCTION

In Michigan, state law has defined marriage as a relationship between one man and one woman since its territorial days. *See* An Act Regulating Marriages § 1 (1820), in 1Laws of the Territory of Mich. 646, 646 (1871). In 1996, this longstanding view of marriage was reaffirmed when the state enacted a law that declared marriage "inherently a unique relationship between a man and a woman." Mich. Comp. Laws § 551.1. In 2004, the people of Michigan took the extraordinary step of amending the state's constitution to protect traditional marriage. This amendment expresses, without equivocation, the will of the people and the policy of the state: "To secure and preserve the benefits of marriage for our society and for future generations of children, the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose." Mich. Const. art. I, § 25.

In 1965, this Court stated that "[m]arriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). And while the Court in *Griswold* ultimately failed to follow its own wisdom by establishing federal precedent that

promotes practices (contraception and abortion) that ultimately destroy the sanctity of marriage, truth reveals that the "noble" purpose of this "sacred" union is the procreation and subsequent rearing of children—a purpose that can only be fulfilled by a man and a woman. *Deboer v. Snyder*, 772 F.3d 388, 405 (6th Cir. 2014) (observing that "nature's laws (that men and women complement each other biologically) . . . created the policy imperative"). This fundamental truth is transcendent and unchangeable.

Indeed, there is a rational basis and a substantial (if not compelling) state interest in limiting marriage to unions between one man and one woman. And one need look no further than the laws of nature to find it. The complementarity of the sexes reiterates a truth that is evident to right reason and recognized as such by all the major cultures of the world. Marriage is not just any relationship between human beings. It has its own nature, essential properties, and purpose. No ideology or political agenda can erase from the human spirit the certainty that marriage exists solely between a man and a woman, who by mutual personal gift, proper and exclusive to themselves, tend toward the communion of their persons. In this way, they mutually perfect each other in order to cooperate in the procreation and upbringing of new human lives.

While social scientists, certain activists and lawyers, and even federal judges appear willing to upset this balance of nature and in the process deny the very essence of our created beings as man and woman, they do so at the peril of society and the common good.

And to be clear, the state is not preventing anyone from forming a same-sex relationship, living with a same-sex partner, or even engaging in perverse sexual acts with a person of the same sex. *See, e.g., Lawrence v. Texas*, 539 U.S. 558, 563 (2003) (striking down on due process grounds a Texas sodomy statute which made it a misdemeanor for a person to "engage[] in deviate sexual intercourse with another individual of the same sex" and thus reversing the convictions of two men who were observed by police officers engaging in anal sexual intercourse). People remain "free" to engage in all sorts of sexually deviant behavior. That "privacy" interest is not at issue. *See generally id.*

What the state (through its people) is not going to do, however, is sanction and thus validate that same-sex relationship as a "marriage" as a matter of law. Nor should it be forced to do so by a federal court, any more than it should be forced to sanction as valid incestuous relationships, relationships between adults and minors, or bigamous relationships, among others.

If the Court is going to disregard the natural law and force a state to sanction same-sex relationships there is no principled way to limit that holding. *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting) (observing that "the Court makes no effort to cabin the scope of its decision to exclude" laws prohibiting, for example, bigamy, adult incest, or bestiality).[2]

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[2] Petitioners argue that they do not seek a "redefinition of the right to marry," (which of course they do), "[t]hey seek simply an end to their exclusion from the freedom to marry the *one* adult of their choice." Petr's Br. at 61 (emphasis added). But why limit it to only *one* adult? Accepting Petitioners' arguments provides no

## SUMMARY OF THE ARGUMENT

Michigan has a rational basis for defining marriage as a relationship between one man and one woman, and that basis is *biology*. The awareness of the biological reality and self-evident truth that couples of the same sex do not have children in the same way as couples of opposite sexes satisfies rational basis review, and, in fact, satisfies a heightened level of scrutiny under the Fourteenth Amendment. Indeed, it is without doubt a proper exercise of Michigan's sovereign authority within our federal system to resolve this public policy issue by preserving the longstanding and traditional definition of marriage as a matter of state law. Therefore, Michigan is not required to license a marriage between two people of the same sex, and it would improper for this Court to conclude otherwise.

## ARGUMENT

### I. Michigan's Marriage Amendment Satisfies the Rational Basis Test.

The question presented is subject to rational basis review. *See Deboer*, 772 F.3d 404-06. Under rational basis review, the Court does not require the state "to have chosen the least restrictive means of achieving its

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principled (or honest) way to confine marriage to just two adults (regardless of gender). Destroying the institution of marriage, which is the inevitable outcome if this Court were to accept Petitioners' arguments, will have disastrous effects. *See* Francis de Sales, *Introduction to the Devout Life*, at 219-20 (John K. Ryan ed., Image Books/Doubleday, New York 1989) (1609) ("[T]he preservation of holy marriage is of the highest importance for the state since it is the origin and source of all that flows from the state."). We can resist natural law for only so long.

legislative end." *Heller v. Doe*, 509 U.S. 312, 330 (1993); *see also San Antonio Indep. Sch. Dist. Dist. v. Rodriguez*, 411 U.S. 1, 51 (1973). As long as it "rationally advances a reasonable and identifiable governmental objective, [the Court] must disregard" the existence of alternative methods of furthering the objective "that [it], as individuals, perhaps would have preferred." *Schweiker v. Wilson*, 450 U.S. 211, 235 (1981).

Indeed, "[r]ational basis review does not empower federal courts to 'subject' legislative line drawing to 'courtroom' factfinding designed to show that legislatures have done too much or too little." *Deboer*, 772 F.3d at 405.

Consequently, the actual question presented is does Michigan have a *rational basis* for defining marriage as a relationship between one man and one woman? The answer to that question is clearly and simply "yes." And Michigan's rational basis is, in a word, *biology*.

As the Sixth Circuit quite properly held:

> By creating a status (marriage) and by subsidizing it (*e.g.*, with tax-filing privileges and deductions), the States created an incentive for two people who procreate together to stay together for purposes of rearing offspring. That does not convict the States of irrationality, only of awareness of the biological reality that couples of the same sex do not have children in the same way as couples of opposite sexes and that couples of the same sex do not run the risk of unintended offspring. That explanation, still relevant today, suffices to allow the States to

> retain authority over an issue they have regulated from the beginning.

*Deboer*, 772 F.3d at 405-06.

In the final analysis, an activist court will no doubt be strongly tempted to substitute its policy preference (whether as an individual judge at the district court level or collectively in the case of this Court or the federal appellate courts) for that of the people of Michigan in such a politicized issue as "same-sex marriage." However, courts have no authority to do so. Forcing the people of Michigan to accept this Court's policy preference on the issue of marriage would be nothing short of lawlessness. *See The Federalist No. 47*, p. 324 (J. Cooke ed. 1961) (J. Madison) ("[The] accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.").

## II. Michigan's Marriage Amendment Also Satisfies a Higher Level of Scrutiny.

Even if this Court were to improperly disregard rational basis review in favor of a higher level of scrutiny by concluding that Michigan's definition of marriage discriminates on the basis of "gender," *see generally* Br. of Pet'rs at ("Whatever limits may be imposed on the right to marry, the gender of the partners cannot be one of them."), Michigan's Marriage Amendment similarly satisfies this level of scrutiny. *See also Clark v. Jeter*, 486 U.S. 456, 461 (1988) (stating that "intermediate scrutiny" applies "to

discriminatory classifications based on sex or illegitimacy").[3]

For example, in *Geduldig v. Aiello*, 417 U.S. 484 (1974), the Court held that a state disability insurance program provision excluding benefits for disability resulting from normal pregnancy did not discriminate on the basis of sex in violation of the Equal Protection Clause. "While it is true," the Court stated, "that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification." *Id.* at 496, n. 20.

In *Michael M. v. Superior Court of Sonoma County*, 450 U.S. 464 (1981), the Court held that California's statutory rape law did not unlawfully discriminate on the basis of gender. The Court stated, "[B]ecause the Equal Protection Clause does not 'demand that a statute necessarily apply equally to all persons' or require 'things which are different in fact . . . to be treated in law as though they were the same,' a statute will be upheld where the gender classification is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated in certain

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[3] Petitioners contend that intermediate scrutiny applies here because "[t]he marriage bans, in tandem with Michigan's second parent adoption law, . . . trigger intermediate scrutiny because the burden and disparate impact on children is at least as onerous as that inflicted by the illegitimacy classifications invalidated by this Court decades ago." Br. of Pet'rs at 54-55. But Petitioners are attempting here to inject an adoption law into the mix to argue against Michigan's Marriage Amendment. Whether Michigan's second parent adoption law requires amending is a matter to take up with the Michigan legislature. It's not a basis for striking down a duly enacted constitutional amendment.

circumstances." *Michael M.*, 450 U.S. at 469 (citations to quotations omitted). Here, same-sex partners are not similarly situated to opposite-sex partners as a matter of biological fact. Therefore, the law does not need to treat them as though they were the same.

Indeed, even in the politicized abortion context the Court "establish[ed] conclusively that it is not *ipso facto* sex discrimination" for a law to disfavor abortion. *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 273 (1993) (citing *Maher v. Roe*, 432 U.S. 464 (1977) and *Harris v. McRae*, 448 U.S. 297 (1980)). In *Bray*, the Court held that for purposes of a claim brought under 42 U.S.C. § 1985(3), opposition to abortion does not reflect an animus against women. As the Court noted, "[I]t cannot be denied that there are common and respectable reasons for opposing [abortion], other than hatred of, or condescension toward (or indeed any view at all concerning), women as a class . . . ." *Bray*, 506 U.S. at 270.

Similarly here, opposition to "same-sex marriage" does not reflect an animus against same-sex partners. There are common and respectable reasons for opposing same-sex marriage, as noted above. The most notable (and common) reason is biology.

It is a biological fact that persons of the same sex are incapable of producing offspring naturally. It matters not that some married couples are incapable of having children for various reasons, whether due to illness, disabilities, or even incarceration. *See Turner v. Safley*, 482 U.S. 78 (1987) (striking down a state regulation of inmate marriages because it was not reasonably related to legitimate penological

objectives).[4] The indisputable fact remains that as a class, same-sex couples cannot reproduce while couples of the opposite sex can.

In *Michael M.*, for example, the Court recognized that because women (and not men) can become pregnant, this fact of nature provides a disincentive for women to engage in the criminal offense of statutory rape (even though not all women are capable of becoming pregnant due to age, physical disabilities, or other reasons). As the Court noted in upholding the statute, the law "reasonably reflects the fact that the consequences of sexual intercourse and pregnancy fall more heavily on the female than on the male." *Id.* at 476. In short, biology provided a legitimate basis for upholding the statute against an equal protection challenge under a heightened level of scrutiny. And the same is true here regarding Michigan's Marriage Amendment.

In closing and drawing upon this Court's reasoning in *United States v. Windsor*, 133 S. Ct. 2675 (2013), the only legitimate result in this case is for the Court to affirm the Sixth Circuit's holding. As stated by this Court (with slight paraphrasing to make the relevant point here):

> In acting [to preserve the longstanding and traditional definition of marriage, Michigan was] responding "to the initiative of those who [sought] a voice in shaping the destiny of their own times." *Bond v. United States*, 564 U.S. ___,

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[4] Under Petitioners' theory of the law, states would likely have to allow male inmates to marry other male inmates.

> ___, 131 S. Ct. 2355, 180 L. Ed. 2d 269 (2011). These actions were *without doubt a proper exercise of its sovereign authority within our federal system*, all in the way that the Framers of the Constitution intended. The dynamics of state government in the federal system are to allow the formation of consensus respecting the way the members of a discrete community treat each other in their daily contact and constant interaction with each other. . . . It reflects . . . the community's considered perspective on the historical roots of the institution of marriage . . . .

*Id.* at 2692-93 (emphasis added).

## CONCLUSION

The Court should hold that the Fourteenth Amendment does not require a state to license a marriage between two people of the same sex.

Respectfully submitted,

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